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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE EDWIN DEWAYNE FRY, also known as Pete Fry, Debtor.	BAP No. NM-03-028
EDWIN DEWAYNE FRY, Plaintiff – Appellant, v. IVAN SIMMONS, STAN MANSKE, DALLAS FRY, and ELDON FRY, Defendants – Appellees.	Bankr. No. 12-99-16379 SS Adv. No. 00-1147 S Chapter 12 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before CLARK, MICHAEL, and BROWN, Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

This appeal brings us yet another chapter in the all too familiar tale of family members fighting over money. Edwin Dwayne Fry ("Edwin") asks this Court to reverse the decision of the court below, which found that Fry's children, Dallas and Eldon, and not Fry, were entitled to over one million dollars in proceeds of life insurance policies on Luella Mae Fry ("Luella"), his deceased ex-wife. Finding no reversible error, we affirm.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

I. Factual Background

Edwin and Luella were married in 1957. On October 30, 1984, Luella executed a document (the "Trust Agreement"), which created a non-testamentary trust (the "Luella Trust"). The assets of the Luella Trust were two insurance policies on the life of Luella issued by Aurora National Life Assurance Company ("Aurora"). These policies provided a death benefit in excess of one million dollars.

The Trust Agreement contained the following terms:

> SECTION 3. UPON MY DEATH, IF MY SPOUSE SURVIVES ME. Upon my death, if my spouse, EDWIN DEWAYNE FRY, survives me, all of the assets then in the trust estate (including all assets payable or deliverable to this trust on account of my death, whether by way of proceeds of insurance on my life or transfers pursuant to the terms of my Will or otherwise) shall be held by the Trustee hereunder for my spouse's primary benefit, pursuant to the SECTION 6 below.
>
> SECTION 4. UPON MY DEATH, IF MY SPOUSE DOES NOT SURVIVE ME. Upon my death, if my spouse, EDWIN DEWAYNE FRY, does not survive me, all of the assets then in the trust estate (including all assets payable or deliverable to this trust on account of my death, whether by way of proceeds of insurance on my life or transfers pursuant to the terms of my Will or otherwise) shall be held and/or distributed as provided in the General Allocation Section below.[1]

Under the terms of the General Allocation Section of the Luella Trust, if Edwin did not survive Luella, upon Luella's death the assets of the Luella Trust were to be distributed to her sons, Dallas and Eldon, on an equal basis.[2] The Luella Trust named Edwin as its trustee, and provided that two other gentlemen, Ivan Simmons ("Simmons") and Stan Manske ("Manske"), would be co-successor trustees of the Luella Trust. In addition, the Luella Trust contained the following provisions:

> SECTION 13. ADD PROPERTY: TRUST IS IRREVOCABLE. I reserve the right, for myself and other persons, to add insurance policies on my life and/or other property to this trust by making lifetime, testamentary or other transfers of property to the Trustee. During the lifetime of the Grantor, this agreement and the trusts established thereunder may be revoked in whole or in part, by an instrument in writing by IVAN SIMMONS of Texas County, Oklahoma, or STAN MANSKE of Cimmaron County, Oklahoma, except that this power of revocation shall

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1 Trust Agreement, *in* Appellant's Appendix at 40.

2 *Id*.

> not be applicable at any time to any trust established pursuant to SECTION 2. hereof, and during the calendar year 1984 this power of revocation shall be applicable only to such amounts of the corpus of the trust established under this agreement as exceeds the greater of $5,000.00 or 5 percent of the aggregate value of said trust (but not more than $20,000.00). But this agreement and the trusts established thereunder shall not be revocable in whole or in part by the Grantor, nor shall the Grantor have the power to revoke, change, annul or amend any of the provisions contained therein.[3]

A substantially identical trust (the "Edwin Trust") was executed by Edwin, listing Luella as the initial beneficiary. At the time of the drafting and execution of the Luella Trust and the Edwin Trust, Edwin and Luella were residents of the state of Oklahoma. Each trust specifically provides that it shall be governed by Oklahoma law.

The marriage fell upon hard times. Edwin and Luella were divorced in 1997. The divorce was acrimonious, and was resolved by trial to the court rather than by agreement. Due to their claims to certain assets held by the family, both Dallas and Eldon intervened in the divorce action. Edwin and Luella were granted a divorce in April 24, 1997,[4] and the divorce court entered its order regarding division of property on June 20, 1997.[5]

The divorce court made no attempt to determine the rights of the respective parties in the Luella Trust. The evidence indicates that each party chose not to present the issue of the Edwin Trust or the Luella Trust to the divorce court for tactical reasons. Counsel for Luella believed that, based upon Oklahoma law (which will be discussed in great detail *infra*), Edwin's interests in the Luella Trust would be terminated upon entry of the decree of divorce.[6] Counsel for Edwin believed that his client's interests in the Luella Trust could not be altered, yet feared an adverse decision from the court

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3 *Id.*, *in* Appellant's Appendix at 45.

4 Civil Trial Docket Sheets, *in* Appellant's Appendix at 193.

5 *Id.*, *in* Appellant's Appendix at 195.

6 Affidavit of Daniel H. Diepenbrock, ¶¶ 1-6, *in* Appellant's Appendix at 144-45.

regarding those interests should the issue of the trusts be raised in the divorce action.[7]

In September of 1998, Simmons executed a document entitled "Partial Revocation to Trust Agreement" in which he sought to revoke the appointment of Edwin as trustee of the Luella Trust.[8] Luella also executed the document. At no time were any judicial proceedings instituted to remove Edwin as the trustee of the Luella Trust.

Luella died on April 13, 2000. On May 11, 2000, Aurora filed an interpleader action in the United States District Court for the Western District of Oklahoma, and paid the sum of $1,124,607.79, representing the proceeds of the insurance policies, into the registry of the court for determination of who was entitled to the monies.[9] Aurora named Edwin, Simmons and Manske as defendants. Said action remains pending.

II. Procedural History

Edwin filed a petition for relief under Chapter 12 of the Bankruptcy Code on November 15, 1999. On July 13, 2000, Edwin filed an adversary proceeding (the "Complaint") against Simmons, Manske, Dallas, Eldon, and Aurora. In the Complaint, Edwin claimed to be "the owner, trustee and beneficiary" of the Luella Trust.[10] In the alternative, Edwin claimed that the Luella Trust was void and that he was "the equitable owner and equitable beneficiary" of the life insurance policies.[11] Under either theory, Edwin claimed that he was entitled to the proceeds from the insurance policies owned by the Luella Trust. The Complaint makes no mention of fraud, nor does it advance any theory of constructive trust.

On October 6, 2000, Edwin filed a motion for summary judgment in the

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[7] Deposition of David Collins at 68 l.2 through 69 l.4, *in* Appellant's Appendix at 368.

[8] Partial Revocation to Trust Agreement, *in* Appellant's Appendix at 205–06.

[9] Complaint for Interpleader at 1, *in* Appellant's Appendix at 50.

[10] Complaint for Declaratory Judgment and Turnover of Property at 2, *in* Appellant's Appendix at 2.

[11] *Id* at 5, *in* Appellant's Appendix at 5.

adversary proceeding. In papers filed in support of the motion, Edwin argued that Oklahoma law did not operate to terminate his interests in the Luella Trust, and that the attempt by Simmons to terminate Edwin as trustee of the Luella Trust was illegal. Once again, Edwin made no mention of fraud. Four days later, Simmons, Manske, Dallas, and Eldon responded by filing their own motion for summary judgment. In that motion, Simmons, Manske, Dallas, and Eldon contended that certain provisions contained in the Oklahoma statutes terminated any interest of Edwin in the Luella Trust upon the entry of the decree of divorce, and that, as a result of these statutes, Edwin had no right to any of the insurance proceeds. Each side responded to the arguments of their adversaries, and the trial court took the matter under advisement.

On April 12, 2001, the trial court issued its memorandum opinion and judgment on both motions for summary judgment (the "First Ruling"). Edwin's motion for summary judgment was denied in its entirety. The motion filed by Simmons, Manske, Dallas, and Eldon was granted in part. The trial court determined that, under Oklahoma law, any interest of Edwin in the Luella Trust was terminated upon the entry of the divorce decree. The trial court further determined that the removal of Edwin as the trustee of the Luella Trust was valid and enforceable. Finally, the trial court determined that a genuine issue of material fact existed as to whether there was a contractual basis for Edwin's claim that he was entitled to the insurance proceeds. That issue was left for further determination.

On at least two occasions after it issued the First Ruling, the trial court held status conferences regarding the progress of this adversary proceeding. At each such hearing, counsel for Edwin indicated that the only issue remaining to be resolved was Edwin's contractual claim to the insurance proceeds. At no time were the issues of fraud or constructive trust raised during these conferences.[12]

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[12] At a conference held on May 1, 2001, counsel for Edwin and the trial court engaged in the following discussions:

(continued...)

On March 18, 2002, Simmons, Manske, Dallas, and Eldon moved for summary judgment with respect to the remaining issue of breach of contract. Edwin filed his response on August 19, 2002, over two years after the initial complaint was filed. In that response, Edwin for the first time argued that Luella was somehow guilty of fraud

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[12] (...continued)

> THE COURT: This is Fry and Simmons, et al., 00-1147. This is a status conference. Present here by telephone is Mr. Lee for Mr. Fry. And Ivan Simmons, et al. are represented by Paul Fish here in the Bankruptcy Court Hearing Room.
>
> This is the status conference which we said that we would go ahead and call to figure out what the remaining trial issues are in this adversary proceeding now that we have, by Summary Judgment, disposed of a number of the other issues.
>
> My recollection from the memorandum opinion and the order is that there was an issue we thought could not be resolved by summary judgment and that was essentially the contract theories that Plaintiff has raised. Do you all have any different thoughts about what the issues are still remaining? I guess, Mr. Lee, you get to go first on that.
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> MR. LEE: Thank you, Judge. No, I believe based on the Court's previous order, the only issues left are whether I can establish, by testimony at trial, that Mr. Fry and Mrs. Fry had a contract intended to benefit each other in the event one or the other of them –
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> THE COURT: Yes, sir.
>
> MR. LEE: I think the contract issues are the only thing left to try.

Transcript of Proceedings at 2-3, *in* Appellant's Appendix at 471–72 (emphasis added). In a subsequent hearing held on January 28, 2002, the following discussion was had:

> THE COURT: Well, the only issue left in connection with this matter, isn't it that there was a contractual basis for Mr. Fry to be able to try to assert his right to administer this estate and –
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> MR. LEE: Yes, sir. Our position is that he and Mrs. Fry had an executed agreement to administer in the event of the death of one or the other. We believe that that, in fact, occurred, and that their actions evidence the fact that they had such an agreement.

Transcript of Proceedings at 2, *in* Appellant's Appendix at 490 (emphasis added).

against him in the divorce proceedings.[13] In their response, Simmons, Manske, Dallas, and Eldon took strong issue with the claim of fraud, arguing among other things that it had not been raised in a timely manner.[14]

On March 6, 2003, the trial court issued its memorandum opinion and order with respect to the March 18, 2002, motion for summary judgment (the "Second Ruling"). In the Second Ruling, the trial court determined that there were no genuine issues of material fact, and that Simmons, Manske, Dallas, and Eldon were entitled to judgment as a matter of law. The trial court specifically noted that Edwin had failed to properly plead or raise any issues of fraud in a timely manner.[15] The trial court went on to note that even if the issue of fraud had been properly raised, Edwin had offered no evidence that supported his claim. With respect to the claim of breach of contract, the trial court found that Edwin was attempting to offer evidence to alter or amend the provisions of the Luella Trust, and that any such evidence was inadmissible under the parol evidence rule. The trial court thus rejected the position advanced by Edwin, and granted summary judgment against him. This appeal followed.

III. Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[16] Neither party elected to have this appeal heard by the United States District Court for the District of New Mexico. They have thus consented to review by this Court.

A decision is considered final "if 'it ends the litigation on the merits and leaves

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[13] *See* Plaintiff's Response to Defendants' Second Motion for Summary Judgment at 20, *in* Appellant's Appendix at 391.

[14] *See* Defendants' Reply to Plaintiff's Response to Defendants' Second Motion for Summary Judgment at 22, *in* Appellant's Appendix at 419.

[15] *See* Memorandum Opinion at 9, *in* Appellant's Appendix at 454.

[16] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1.

nothing for the court to do but execute the judgment.'"[17] In this case, the order of the bankruptcy court determined the priority of the interests of Edwin, Dallas, and Eldon in and to the insurance proceeds. Nothing remains for the trial court's consideration. Thus, the order is "final" for purposes of 28 U.S.C. § 158.

IV. Standard of Review

We review a grant of summary judgment *de novo*.[18] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[19] "In reviewing a summary judgment motion, the court is to view the record 'in the light most favorable to the nonmoving party.'"[20]

When reviewing questions of law *de novo*, the appellate court is not constrained by the trial court's conclusions, and may affirm the trial court on any legal ground supported by the record.[21]

V. Discussion

In order to resolve this appeal, we must ascertain whether the trial court erred in granting summary judgment. This requires us to determine whether the trial court correctly found that: (1) under Oklahoma law, the divorce terminated Edwin's beneficial interest in the Luella Trust; (2) the parol evidence rule required exclusion of evidence regarding the alleged contract between Edwin and Luella; and (3) issues of

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[17] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

[18] *Kojima v. Grandote Int'l Ltd. Liability Co. (In re Grandote Country Club Co., Ltd.*), 252 F.3d 1146, 1149 (10th Cir. 2001).

[19] Fed. R. Civ. P. 56(c).

[20] *Grandote*, 252 F.3d at 1149 (quoting *Thournir v. Meyer*, 909 F.2d 408, 409 (10th Cir. 1990)).

[21] *See Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1524 (10th Cir. 1997).

fraud were neither timely raised nor properly proven. The Court must also decide whether Edwin can raise a theory of constructive trust for the first time on appeal.

The Oklahoma Statutes

The parties agree that the Luella Trust is governed by Oklahoma law. In 1987, the Oklahoma legislature enacted the following provision regarding the effect of a divorce decree on a trust that had the ex-spouse as its primary beneficiary:

> **§ 175. Trust for benefit of spouse revoked upon death of maker--Annulment or divorce--Exemptions**
>
> A. If, after making an express trust, the trustor is divorced, all provisions in such express trust in favor of the trustor's former spouse, which are to take effect upon the death of the trustor, are thereby revoked. Annulment of the trustor's marriage shall have the same effect as a divorce. In the event of either divorce or annulment, the trustor's former spouse shall be treated for all purposes under the express trust, as having predeceased the trustor. For purposes of this section, "express trust" shall include a "Totten Trust" as described in Section 902 of Title 6 of the Oklahoma Statutes and shall not include a "business trust".
>
> B. Subsection A of this section shall not apply:
>
> 1. If the decree of divorce or annulment is vacated;
>
> 2. If the trustor had remarried said former spouse and was married to said spouse at the time of the trustor's death;
>
> 3. If the decree of divorce or annulment contains a provision expressing an intention contrary to subsection A of this section;
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> 4. If the trustor makes the express trust subsequent to the divorce or annulment;
>
> 5. To the extent, if any, the express trust contains a provision expressing an intention contrary to subsection A of this section; or
>
> 6. If prior to the death of the trustor and subsequent to the divorce or annulment, the trustor executes an amendment to said express trust which is not revoked or held invalid.
>
> C. This section shall apply to any express trust, the trustor of which dies on or after November 1, 1987.[22]

Edwin and Luella were divorced in 1997, after the creation of the Luella Trust. The

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[22] Okla. Stat. Ann. tit. 60, § 175 (West 1994) (hereafter "§ 175").

decree of divorce makes no mention of or provision for the Luella Trust or the Edwin Trust. Their divorce was never annulled or vacated, and Edwin and Luella never remarried. Luella died after the November 1, 1987, effective date of the statute. On its face, § 175 is applicable to the present case. Under its terms, the effect of Edwin and Luella's divorce was to revoke all provisions of the Luella Trust that favored Edwin.

At the trial court, Edwin argued that "his interests [in the Luella Trust] were fixed and irrevocable by terms of the trust document and could not be defeated by an act of the Oklahoma legislature."[23] Edwin also argued that to the extent the statute impaired his rights under the Luella Trust, it was unconstitutional. The trial court rejected each of these arguments.

The intellectual linchpin in Edwin's argument is his contention that his interests in the Luella Trust were indefeasible at the time the Luella Trust was created. These arguments were raised before and rejected by the trial court.

> The clear language of the [Luella] Trust requires that Plaintiff [Edwin] survive Grantor [Luella] for him to have the enjoyment of any of the assets, so that until the moment of Grantor's death there was uncertainty as to who would take the remainder. Plaintiff's interest in the trust was therefore uncertain and postponed to a future event; i.e. his survival, and his interest, was therefore contingent.[24]

The trial court went on to hold that, under Oklahoma law, where the terms of a trust

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[23] Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Summary Judgment at 8, *in* Appellant's Appendix at 225.

[24] Order at 8, *in* Appellant's Appendix at 266. The trial court's conclusion was based upon the following terms of the Luella Trust:

> 1. During Luella's life, all income from the Luella Trust was to be accumulated and added to the principal of the Luella Trust;
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> 2. Upon Luella's death, if Edwin survived Luella, Edwin had the right to income from the Luella Trust, as well as the right to invade principal under the terms and provisions of the Luella Trust;
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> 3. Upon Luella's death, if Edwin did not survive Luella, the assets of the Luella Trust were to be held and distributed pursuant to the general allocation provisions of the Luella Trust.

Order at 7-8, *in* Appellant's Appendix at 265–66.

instrument postpone the vesting of a beneficiary's rights until the occurrence of some future event, that beneficiary holds a contingent, and not a vested, interest in the trust.[25] We find no error in this conclusion, nor do we find summary judgment to have been improvidently granted on this issue.

Having determined that the interest of Edwin in the Luella Trust to be contingent in nature, the next question addressed by the trial court (and thus presented to us for review) is whether, as a matter of law, the Oklahoma legislature had the power, through the enactment of § 175, to affect Edwin's contingent interest in the Luella Trust. The Oklahoma Supreme Court has consistently held that the "mere expectancy of future contingent interests do not constitute vested rights that would deprive the Legislature of the power to enact the statute authorizing revocation of a voluntary grant."[26] The trial court determined that the interest held by Edwin was contingent and thus subject to the enactment of § 175 by the Oklahoma Legislature. We find no error. To the extent Edwin advances his claim under a theory of contract law, we discuss the same *infra*.

Edwin also contends that, to the extent § 175 impairs his rights under the Luella Trust, the statute is unconstitutional. The United States Court of Appeals for the Tenth Circuit has recently addressed this very issue. In *Stillman v. TIAA-CREF*,[27] the husband (Dale) purchased two annuities in 1965. When the annuities were purchased, Dale named his wife (Marilyn) as the primary beneficiary and his children as contingent beneficiaries. In 1970, Dale and Marilyn were divorced. One year later, Dale married his second wife, Yaeko. In 1988 and again in 1997, Dale purchased two more annuities, naming Yaeko as the primary beneficiary and Erin, the child of Dale and Yaeko, as contingent beneficiary. In 1998, the Utah legislature amended the Utah

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[25] Order at 6-7, *in* Appellant's Appendix at 264–65 (citing *Hulett v. First Nat'l Bank and Trust Co.*, 956 P.2d 879, 884–85 (Okla. 1998)).

[26] *Cavett v. Peterson*, 688 P.2d 52, 58 (Okla. 1984) (citing with approval *Atchison v. Deitrich*, 315 P.2d 265 (Okla. 1957), and *MacMillan v. Branch Banking & Trust Co.*, 20 S.E.2d 276 (1942)).

[27] 343 F.3d at 1311 (10th Cir. 2003).

Probate Code to provide that the entry of a decree of divorce served to revoke any revocable "disposition or appointment of property made by a divorced individual to his former spouse in a governing instrument[.]"[28] The statute provided for certain exceptions to this general rule, none of which were applicable.

In January of 1999, after being diagnosed with cancer, Dale executed a new will in which he expressly left all of his property to Yaeko, with Erin as the contingent beneficiary. In the will, Dale expressly stated that he had no intention to provide support for Marilyn or their children. However, Dale failed to change the beneficiary designation on the 1965 annuities. Dale died one month later.

After Dale's death, Marilyn and the one surviving child of her marriage to Dale (Nicolas) filed suit against the annuity company to obtain the proceeds of the 1965 annuities. The annuity company added Yaeko and Erin to the action and interpleaded the proceeds of the 1965 annuity. Erin filed a counterclaim against Marilyn and Nicolas, contending that she and Nicolas were each entitled to one-half of the proceeds of the 1965 annuity, while Marilyn was entitled to nothing. Each of the parties moved for summary judgment. Yaeko and Erin argued that under the Utah statute any interest of Marilyn or her children in the 1965 annuities was terminated. Marilyn and Nicolas argued that: (1) application of the Utah statute to the 1965 annuities would be an improper retroactive application of the statute; (2) the effective date of the Utah statute was well after the date of the 1965 annuities and, as such, the Utah statute did not apply to them; and (3) to the extent the Utah statute applied to the 1965 annuities, it did so in violation of the Contracts Clause of the United States Constitution. The trial court agreed with these arguments and granted summary judgment to Marilyn, denying *in toto* the claims of Erin and Yaeko.

The United States Court of Appeals for the Tenth Circuit reversed and remanded for further proceedings. In doing so, the court of appeals held that application of the

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[28] Utah Code Ann. § 75-2-804(2)(a)(I) (2003).

Utah statute to the 1965 annuities did not violate any statutory presumption of non-retroactivity. The court also expressly held that the Utah statute did not violate the Contracts Clause, finding that the statute did not impair any contractual rights, but only affected a donative transaction between Dale and Marilyn. The court noted that if Dale had wished to maintain his original intent to provide for Marilyn and/or the children borne of their marriage, he could have done so in his 1999 will. Applying the rationale of *Stillman* to the facts presently before the court, it appears that the trial court correctly applied § 175 to the Luella Trust and also correctly determined the statute to be constitutional.

Edwin argues that to allow § 175 "to control would be manifestly inequitable, and cannot be consonant with the goal of the Oklahoma legislature in enacting Section 175."[29] With respect to the claim of manifest inequity, Edwin advances neither fact nor law. With respect to the alleged goals of the Oklahoma Legislature, Edwin offers no legislative history to support his position.[30] Instead, Edwin offers a citation to a decision of the United States Court of Appeals for the Eighth Circuit in support of his interpretation of what the Oklahoma Legislature intended.[31] Given this lack of support, we find Edwin's argument unpersuasive.

The Contract Claim

In his second line of argument, Edwin contends that "he and Luella had a contract to enter into mutual, reciprocal, irrevocable trusts," which were not subject to alteration

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[29] Appellant's Reply Brief at 10.

[30] Indeed, it is the understanding of this tribunal that the Oklahoma Legislature does not maintain any records of its activities that could be considered substantive legislative history.

[31] *See Whirlpool v. Ritter*, 929 F.2d 1318, 1323 (8th Cir. 1991), *cited in* Appellant's Reply Brief at 10. The *Whirlpool* decision has recently been categorically rejected by the United States Court of Appeals for the Tenth Circuit. *See Stillman v. TIAA-CREF*, 343 F.3d at 1322.

under any circumstances.[32] The trial court rejected this argument, finding that the parol evidence rule barred introduction of evidence of the parties negotiations prior to the execution of the Edwin and Luella Trusts. The position taken by the trial court is supported by Oklahoma statutory and decisional law.[33]

Section 13 of the Luella Trust expressly provides for the removal of Edwin as both beneficiary and trustee under certain circumstances.[34] Any contention that Edwin and Luella agreed differently runs directly contrary to the terms of the Luella Trust. The trial court refused to consider any such evidence in light of the parol evidence rule.

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[32] Appellant's Opening Brief at 10. The trial court's framing of the issue provides additional insight into the position advanced by Edwin:

> Plaintiff argues that the contract at issue consisted of more than just an agreement to enter into identical trusts; he claims that there was an agreement predating the trusts to ensure that, no matter what, he would receive the proceeds of Luella's insurance in the event of her death. *See* Plaintiff's Response, doc. 63, p.1. He also claims that this agreement/contract predates the trusts and survives the divorce. *Id.*, p. 18.

Memorandum Opinion at 6-7, *in* Appellant's Appendix at 451–52 (footnote omitted).

[33] *See* Okla. Stat. Ann. tit. 15, § 137 (West 1996) ("The execution of a contract in writing, whether the law requires it to be written or not, supercedes all the oral negotiations concerning its matter, which preceded or accompanied the execution of the instrument."); *First Nat'l Bank v. Honey Creek Entm't Corp.*, 54 P.3d 100, 103 (Okla. 2002) (parol evidence inadmissible to vary, modify or contradict terms of a writing); *Southwestern Bell Media, Inc. v. Eden*, 848 P.2d 584, 585 (Okla. Ct. App. 1993) (parol evidence inadmissible even to establish terms consistent with the written instrument).

[34] Section 13 of the Luella Trust provides in part that:

> During the lifetime of the Grantor, this agreement and the trusts established thereunder may be revoked in whole or in part, by an instrument in writing by IVAN SIMMONS of Texas County, Oklahoma, or STAN MANSKE of Cimmaron County, Oklahoma, except that this power of revocation shall not be applicable at any time to any trust established pursuant to SECTION 2. hereof, and during the calendar year 1984 this power of revocation shall be applicable only to such amounts of the corpus of the trust established under this agreement as exceeds the greater of $5,000.00 or 5 percent of the aggregate value of said trust (but not more than $20,000.00).

Trust Agreement, Exhibit 1 of Plaintiff's Memorandum in Support of Summary Judgment, *in* Appellant's Appendix at 45 (emphasis added). Any suggestion that the Luella Trust was absolutely irrevocable under its terms is not well taken.

There being no factual dispute regarding the terms contained within the Luella Trust, the trial court correctly granted summary judgment on this issue.

In support of his claim that Oklahoma law recognizes and enforces contractual agreements to create irrevocable transfers, Edwin relies upon *Robison v. Graham*.[35] *Robison* is factually inapplicable to the case at bar. *Robison* involved a mutual and conjoint will executed by both husband and wife. The will at issue contained an express written provision to the effect that its terms were not revocable by either party.[36] The husband later prepared a separate will purporting to revoke the mutual will. The trial court found the mutual will to create a valid contractual expectation of irrevocability, and held for the wife. The intermediate court of appeals reversed. On further appeal, the Oklahoma Supreme Court reinstated the decision of the trial court, finding the contractual provisions contained in the original mutual will to be valid and enforceable. In the present case, not only does the Luella Trust not contain any such statement regarding irrevocability, it contains provisions allowing for its partial or total revocation.

Edwin alleges that a material question of fact remains as to whether he and Luella intended to create absolutely irrevocable trusts. In his own words, Edwin argues that "the contract between the parties consisted of more than just an agreement to enter into identical trusts, and that the agreement between the parties predated the trusts' creation [sic] and survived the divorce."[37] The argument ignores the parol evidence rule. The trial court correctly applied the parol evidence rule and refused to consider evidence of any alleged agreement that predated the execution of the trusts. Rather than commit error, the trial court correctly applied the law.[38]

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35 799 P.2d 610 (Okla. 1990).

36 *Id*. at 612.

37 Appellant's Opening Brief at 12.

38 Interestingly, Edwin also relies upon *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (continued...)

Edwin also contends that an issue of fact exists as to whether Edwin and Luella intended that each of them actually own the rights to the policies on the life of the other. Put another way, Edwin argues in the alternative that the documents creating the Luella and Edwin Trusts were of no force and effect. In support of this argument, Edwin offered his own affidavit, in which he contended that he and Luella agreed that Edwin would "own" the Luella Trust and that Luella would "own" the Edwin Trust.[39] Unfortunately, this affidavit is not a part of the record before this Court. However, Edwin made substantially the same allegation in an affidavit that is of record herein.[40] The trial court rejected these affidavits as being mere attempts to create a "sham" issue of fact.[41] The reasoning of the trial court is sound and does not constitute grounds for

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[38] (...continued)
(10th Cir. 1996) for the proposition that the Luella Trust was irrevocable as a matter of contract law. *See* Appellant's Opening Brief at 15. The *Chiles* case, which is factually an ERISA case, holds that "[t]he terms of trusts created by written instruments are determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible." *Id.* at 1515 (citations and quotation omitted) (emphasis added). In the present case, the trial court looked to the terms of the Luella Trust to determine whether it could be revoked, and refused to consider inadmissible parol evidence as it reached its conclusion. Such conduct could hardly be considered reversible error.

[39] Memorandum Opinion at 6, *in* Appellant's Appendix at 449.

[40] Affidavit of Edwin Dewayne Fry, Exhibit A to Plaintiff's Memorandum in Support of Summary Judgment, *in* Appellant's Appendix at 36.

[41] In the words of the trial court:

> Plaintiff [Edwin] actually claims that the agreement was to "own" each other's life insurance. Plaintiff's Response, Doc. 63, p. 1. This claim is not supported by anything in the record except Plaintiff's affidavit. *See* August 13, 2002, Affidavit of Edwin Dewayne Fry, Exhibit A to Plaintiff's response to Defendants' Second Motion for Summary Judgment (doc. 64), ¶¶ 2, 4 and 6. In fact, the claim is contradicted by overwhelming and undisputed evidence that the trusts became the owners of the life insurance policies. See Memorandum Opinion, fact 3, p.2. *See also* Plaintiff's own Complaint for Declaratory Judgment and Turnover of Property, doc. 1, ¶ 5 ("The sole assets of the Trust are two (2) life insurance policies.") and ¶ 8 ("At the present time, the sole assets of the Trust are the proceeds of the two (2) life insurance policies.") A contrary affidavit may be disregarded if the Court determines it is an attempt to create a sham fact

(continued...)

reversal of its decision.

Fraud

Finally, Edwin argues that he is entitled to the proceeds of the insurance policies owned by the Luella Trust due to fraud allegedly committed upon him by Luella during the trial of the divorce action. The fraud apparently relates to the fact that Luella believed that § 175 would preclude Edwin from receiving proceeds from the Luella Trust if she predeceased him. As noted in the procedural background section of this order, the issue of fraud was not raised by Edwin until he filed his reply brief to the second motion for summary judgment filed by Simmons, Manske, Dallas, and Eldon.

The trial court rejected the claim of fraud on three bases: (1) it was neither sufficiently nor timely pled; (2) the allegations of fraud were made related to the divorce trial, and not to the creation of the Edwin and Luella Trusts; and (3) the fact that Edwin claimed not to understand the legal effect of the revocation provisions in the Luella Trust did not allow him to escape them.[42] The record supports the conclusion reached by the trial court.

There are no allegations of fraud contained in the Complaint. Edwin has never sought leave to amend the Complaint to include a claim sounding in fraud. Indeed, on at least two occasions after the First Ruling, the trial court held telephonic conferences where it inquired of counsel for Edwin as to the scope of the issues left to be tried. In each instance, counsel for Edwin advised the trial court that the only issue remaining for trial was a claim sounding in breach of contract. The allegations of fraud were made in response to the second motion for summary judgment filed by Simmons, Manske, Dallas,

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[41] (...continued)
issue. *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986); *Rios v. Bigler*., 67 F.3d 1543, 1551-52 (10th Cir. 1995); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1016-17 (10th Cir. 2002). The Court will disregard this attempt by Plaintiff to create a fact question on the ownership of the insurance policies.

Memorandum Opinion at 6 n.1, *in* Appellant's Appendix at 451.

[42] Memorandum Opinion at 9-11, *in* Appellant's Appendix at 454–56.

and Eldon.[43] At that point in time, this adversary proceeding had been pending for more than two years. The trial court found that this was too late in the proceedings for the raising of such an issue.[44] This conclusion falls well within the discretion of the trial court.[45]

The trial court also correctly noted that all allegations of fraud related to representations purported made during the trial of the parties' divorce, an event that occurred some thirteen years after creation of the Luella and Edwin Trusts. It is difficult to understand how conduct after the creation of the trusts can have an impact on their interpretation. Certainly Edwin cannot be arguing that what Luella did during the divorce impacted his decision to execute the trust agreements. Finally, to the extent Edwin argues that he did not understand the terms of the Luella Trust, that fact, even if true, does not preclude enforcement of the Luella Trust according to its terms.[46]

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[43] In his opening brief submitted to this court, Edwin argues that:

> Fry [Edwin] contended that the contract between the parties consisted of more than just an agreement to enter into identical trusts, and that the agreement between the parties predated the trusts' creation and survived the divorce. [Appndx 000372-74]. Fry argued that the apparent subsequent fraud by Luella and her attorney to defeat the intent of the contract without notice to Fry should not be countenanced. [Appndx 000375]

Appellant's Opening Brief at 12 (citations to record in original). What is telling is that the references to the record are to portions of the brief that Edwin submitted in opposition to the second motion for summary judgment filed by Simmons, Manske, Dallas, and Eldon.

[44] *See* Memorandum Opinion at 18, *in* Appellant's Appendix at 463; *see also Auston v. Shubnell*, 116 F.3d 251, 255 (7th Cir. 1997) (refusing to allow new claim to be raised in motion for summary judgment).

[45] *See Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 799 (10th Cir. 1998) (decision whether to grant leave to amend complaint is matter within discretion of the trial court); *see also Franks v. Nimmo*, 796 F.2d 1230, 1238 (10th Cir. 1986) (affirming decision to deny motion for leave to amend complaint made over two years after case filed and after motion for partial summary judgment granted).

[46] *See C.I.T. Corp. v. Sautbine*, 56 P.2d 1175, 1176-77 (Okla. 1936) (party presumed to know contents of document that he or she signs); *see also United Petroleum Co. v. Okla. Water Res. Bd.*, 898 P.2d 1275, 1279 (Okla. 1995) (party is presumed to know the law).

Constructive Trust

In the alternative, Edwin argues that he is entitled to the proceeds under a theory of constructive trust. This legal theory was raised for the first time on appeal. We will not consider for the first time on appeal an argument that was not presented to the court below.[47] At oral argument, counsel for Edwin contended that the issue of constructive trust was somehow implicitly present in the pleadings before the trial court. Even if this allegation is somehow correct, it does not preserve the issue of constructive trust for purposes of appeal.[48]

VI. Conclusion

The decision of the trial court is AFFIRMED.

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[47] *See Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 720 (10th Cir. 1993) (and cases cited therein) ("We have therefore repeatedly stated that a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory.").

[48] *See id.* at 722 (theory discussed in a vague and ambiguous way at trial will not normally be considered on appeal).